IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

---

No. 78-1181

---

PATRICK BATT, Petitioner,

v.

MARION HEIGHTS, INC., SISTER LILLIAN VAN DOMLEN, SISTER ROSALIE KLEIN, SISTER M. MEL O'DOWD, SISTER ANGIOLA STICKELMAIER, SISTER PEYTON RYAN, DELORES GENCUSKI, MRS. A. BOEHM, JOHN CONWAY, ROBERT HACKETT, GERALD FALCI, and ROGER N. HAMILTON, Respondents.

---

# BRIEF FOR RESPONDENTS

---

BRUCE C. O'NEILL

Attorney for Respondents

Of Counsel:
FOX, CARPENTER, O'NEILL & SHANNON, S.C.
622 North Water Street
Milwaukee, Wisconsin 53202
(414) 273-3939

INDEX



CITATIONS

CASES:







STATUTES:

Page

OTHER AUTHORITIES:



IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

---

No. 78-1181

---

PATRICK BATT, Petitioner,

v.

MARION HEIGHTS, INC., et al, Respondents.

---

QUESTION INVOLVED

---

Whether the instant complaint was properly dismissed for failure to state a claim upon which relief can be granted under 42 U.S.C. sec. 1983 due to the complaint's failure to allege:

a). Any state involvement in the alleged discriminatory act;

b). Any symbiotic relationship between the state and the nursing home, or

c). Any performance of a public function by the nursing home?

## STATEMENT OF THE CASE

The petitioner sued the respondents for a violation of 42 U.S.C. sec. 1983. The respondents moved to dismiss the complaint on the basis that it did not state a claim upon which relief could be granted and upon the basis that the district court lacked subject matter jurisdiction. The respondents' motion was directed toward the allegations in paragraphs 7 through 11 in the complaint that the respondents acted under color of State law.

The complaint alleges that:

(a) The respondent nursing home is extensively regulated by the State of Wisconsin (para. 7);

(b) The majority of operating funds for the respondent nursing home are provided



by the United States of America through the State of Wisconsin in the form of Medicare-Medicaid funds (para 8);

(c) The respondent nursing home participates in the WIN Employment Training program that is partially funded by the United States of America and partially funded by the State of Wisconsin and which is administered by the State of Wisconsin (para 9);

(d) The respondent nursing home has therapy programs that are funded by the United States of America (para. 10); and

(e) One of the individual respondents is licensed by the State of Wisconsin (para. 11).[1]

---

1 There are no allegations in the complaint that the nursing home received either Hill-Burton funds (42 U.S.C. sec. 291) or funds from the State of Wisconsin under Chapter 231 of the Wisconsin Statutes. Therefore, the references in petitioner's brief to Hill-Burton funds at pages 3 and 28-30 and to ch. 231, Wis. Stats. at page 22 should be disregarded.

The district court granted the respondents' motion and dismissed the action upon the basis that the complaint failed to state a claim upon which relief could be granted due to its failure to adequately plead State action. The district court's order was affirmed by the United States Court of Appeals for the Seventh Circuit as reported at 586 F.2d 59.

ARGUMENT

A claim for relief under sec. 1983 must embody two elements. The plaintiff first must show that he has been deprived of a right secured by the Constitution and the laws of the United States. The plaintiff secondly must show that the defendant deprived him of that right acting under color of state law. Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 155 (1978). In the present case the petitioner alleged that the Constitution secured to him the right to be free from discrimination based upon his sexual



preference to be a homosexual. He further alleged that the respondent nursing home deprived him of that right acting under color of state law.

The nursing home moved to dismiss upon the basis that, assuming arguendo that one has a constitutional right to be free from sexual preference discrimination, the complaint did not allege that the nursing home deprived him of such right acting under color of state law. The trial court dismissed the complaint, and the appellate court affirmed such dismissal upon the basis that the complaint did not allege state action.

In its decision herein the United States Court of Appeals for the Seventh Circuit set forth three different theories of state action under which one can plead a claim for relief under 42 U.S.C. sec. 1983. The court derived those theories from Mr. Justice Rehnquist's trilogy of state action opinions in Flagg Brothers, supra; Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); and Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). Those

theories are: state involvement in the discriminatory act (nexus), state instrumentality (symbiotic relationship) and public function. The Seventh Circuit found the complaint of the petitioner herein to be insufficient under each of those theories.

The petitioner does not quarrel with the appellate court's delineation of the permissible theories of state action. The petitioner argues, however, that the court misinterpreted and misapplied each of those three theories with regard to the claim alleged in his complaint. He inexplicably presents his argument under the methodology of a 1974 case from the United States Court of Appeals for the Second Circuit, but his argument is essentially that the complaint adequately pleads state action under each of the three theories.

NEXUS

The complaint does not allege and the petitioner does not argue that the State of Wisconsin encouraged, approved, supported or was directly involved in the



nursing home's firing of the petitioner on the alleged basis of being a homosexual. The petitioner's only argument as to nexus appears at pages 13 and 14 of his brief. He argues that he administered various state and federal programs at the nursing home. This is of no relevance. It is the nexus between the State involvement in the nursing home's challenged activity (the alleged discrimination) that is crucial, not the nexus between the State involvement and the petitioner's duties for the nursing home. This court made that distinction clear in its three state action cases cited above.

In Moose Lodge a black guest was refused service in a private club's dining room because of his race. He correctly argued that he had been deprived of a constitutional right. He further argued that the deprivation was under color of state law, since the private club operated pursuant to a liquor license issued by Pennsylvania and was subject to detailed regulation by that state. This Court rejected the

"state action" claim and stated:

"The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Cause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatsoever.*** Our holdings indicate that where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations,' Reitman v. Mulkey, 387 U.S. 369, 380 (1967), in order for the discriminatory action to fall within the ambit of the constitutional prohibition." (407. U.S. at p. 173)

This Court further observed as follows:

"...there is no suggestion in this record that the Pennsylvania statutes and regulations governing the sale of liquor are intended either



overtly or covertly to encourage discrimination." (407 U.S. at p. 173)

and

"...the Pennsylvania Liquor Control Board plays absolutely no part in establishing or enforcing the membership or guest policies of the club which it licenses to serve liquor." (407 U.S. at p. 175)

and

"...the Pennsylvania Liquor Control Board has neither approved nor endorsed the racially discriminatory practices of Moose Lodge." (407 U.S. at p. 176, fn. 3)

and

"However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination." (407 U.S. at pp. 176-77)

and

"...the operation of the regulatory scheme

enforced by the Pennsylvania Liquor Control Board does not sufficiently implicate the State in the discriminatory guest policies of Moose Lodge so as to make the latter 'State action' with the ambit of the Equal Protection Clause of the Fourteenth Amendment." (407 U.S. at p. 177)

In Jackson v. Metropolitan Edison Co., supra, this court, citing Moose Lodge, again set forth the need for nexus in a state action claim. In Jackson, a customer's electricity service had been terminated for alleged nonpayment without any notice, hearing or opportunity to pay. She argued that she had been deprived of a constitutional right and that such deprivation had been under color of state law. She supported the latter allegation by pointing to the facts that the utility was extensively regulated by Pennsylvania, that it was a monopoly protected by the state and that it received authorization and approval from the state as to its termination pro-



cedure through having filed a tariff containing such procedure with the state without any subsequent objection from the state. This Court rejected the state action claim and held that state regulation, even though detailed and extensive, did not convert the action of a private party into the action of the State. This Court stated that "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself. (419 U.S. at p. 351)

This Court held that there was an insufficient "relationship" and "connection" between the "challenged actions" and the monopoly status of the utility. (419 U.S. at p. 352)

This Court also held that the State's failure to disapprove the tariff containing the termination procedure was not state action, since the State had

not ordered the proposed practice. (419 U.S. at p. 357)

This Court noted that, "As in Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972), there is no suggestion in this record that the Pennsylvania Public Utility Commission intended either overtly or covertly to encourage the practice." (419 U.S. at p. 357, fn. 17) This Court then stated, "We conclude that the State of Pennsylvania is not sufficiently connected with respondent's action in terminating petitioner's service so as to make respondent's conduct in so doing attributable to the State for purposes of the Fourteenth Amendment." (419 U.S. at pp. 358-59)

In Flagg Brothers, supra, this Court, citing Jackson and Moose Lodge, again set forth the need for nexus in a state action claim. In Flagg Brothers the respondents' goods had been stored with a warehouseman, a dispute arose between them as to payment of the storage price and the warehouseman proposed to sell the goods as permitted by a New York statute.



The respondents argued that they were being threatened with a deprivation of a constitutional right by the warehouseman and that such deprivation was under color of state law. They supported the latter allegation by pointing to the state statute which permitted a warehouseman to sell stored goods to collect his storage price. They argued that New York "authorized and encouraged" the warehouseman's proposed action by enactment of the statute. (436 U.S. at p. 164) This Court rejected the state action claim under the nexus theory and stated as follows:

> "Respondents further urge that Flagg Brothers' proposed action is properly attributable to the State because the State has authorized and encouraged it in enacting sec. 7-210. Our cases state 'that a State is responsible for the... act of a private party when the State, by its law, has compelled the act.' Adickes, supra, at 170. This Court, however, has never held that a State's mere acquiescence in a private

action converts that action into that of the State. The Court rejected a similar argument in Jackson, supra, at 357:

'Approval by a state utility commission of such a request from a regulated utility, where the commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the commission into 'state action''. (Emphasis added)

"The clearest demonstration of this distinction appears in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), which held that the Commonwealth of Pennsylvania, although not responsible for racial discrimination voluntarily practiced by a private club, could not by law require the club to comply with its own discriminatory rules. These cases clearly rejected the notion that our prior cases permitted the imposition of Fourteenth Amendment restraints



on private action by the simple device of characterizing the State's inaction as 'authorization' or 'encouragement'". (436 U.S. at pp. 164-65)

This Court concluded that, although New York 'permits' Flagg Brothers to sell the goods, it did not 'compel' it to sell those goods. (436 U.S. at p. 165)

In the present case there is no allegation or inference that can be drawn from any allegation that the State of Wisconsin encouraged or approved the firing of homosexuals much less that the State compelled such firing.

The decision of the Seventh Circuit is totally consistent with the three foregoing state action opinions of this Court. It is also consistent with its own other three recent state action opinions requiring a nexus to be pleaded between the state involvement and the challenged activity. See Cohen v. Illinois Institute of Technology, 524 F.2d

818 (7th Cir. 1975), cert. den. 425 U.S. 943 (1976), in which Justice Stevens wrote the opinion; Cannon v. University of Chicago, 559 F.2d 1063 (7th Cir. 1976), reh. den. (1977), cert. granted on other grounds, --U.S.--, 98 S.Ct. 3142 (1978); and Cohen v. Illinois Institute of Technology, 581 F.2d 658 (7th Cir. 1978), cert. den. 47 U.S.L.W. 3497 (January 22, 1979).

It is also instructive to note that the oral argument to this Court on January 9, 1979 in the Cannon case by the attorneys for the parties and by the Solicitor General as reported at 47 U.S.L.W. 3471-72 (January 16, 1979), proceeded on the premise that there was no relief available to the petitioner under 42 U.S.C. sec. 1983.

See also McCoy, Current State Action Theories, the Jackson Nexus Requirement, and Employee Discharges by Semi-Public and State-Aided Institutions, 31 Vanderbilt Law Review 785 (1978), where the author interprets this Court's recent state action opinions as



requiring a nexus between the state involvement and the challenged activity.

STATE INSTRUMENTALITY

As an alternative to the nexus pleading requirement and to the limited doctrine of public function, the Seventh Circuit recognized a state instrumentality theory of state action. This theory is nothing more than the symbiotic relationship theory of Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

The Seventh Circuit made clear that mere allegations of state funding and administration would not be sufficient under this theory. There would have to be allegations that the State controlled the private entity.

This Court has not found a symbiotic relationship type of state action since its decision in Burton in 1961. In Jackson, supra, this Court also cautioned that its decision in Burton may well be limited to its facts. This Court stated:

"We also find absent in the instant case the

symbiotic relationship presented in Burton v. Wilmington Parking Authority, 365 U.S. 705 (1961). There where a private lessee, who practiced racial discrimination, leased space for a restaurant from a state parking authority in a publicly owned building, the Court held that the State had so far insinuated itself into a position of interdependance with the restaurant that it was a joint participant in the enterprise. Id., at 725. We cautioned, however, that 'while a multitude of relationships might appear to some to fall within the Amendment's embrace,' differences in circumstances beget differences in law, limiting the actual holding to lessees of public property." (419 U.S. at pp. 357-58)

In Lucas v. Wisconsin Electric Co., 466 F.2d 638 (7th Cir. 1972), (en banc), cert. den. 409 U.S. 1114 (1973), the Seventh Circuit construed Burton as being a case involving 'state participation in the discriminatory act itself, and hence State



action...." (466 F.2d at p. 647, fn. 16). Similarly, in Doe v. Bellin Memorial Hospital, 479 F.2d 756 (7th Cir. 1973), which involved a sec. 1983 lawsuit against a private Wisconsin hospital and its officials for denying use of the hospital's facilities for abortions, the Seventh Circuit distinguished Burton therein by holding that the State of Wisconsin was not a beneficiary of the hospital's rules in question and that the State could not be characterized as a joint participant in their adoption or enforcement therein. (479 F.2d at p. 761).

In reviewing the petitioner's brief herein as to the state instrumentality theory of state action, it must be noted that the brief refers to "public funding" and "governmental funding" as opposed to state funding. This is because his complaint alleges that the majority of funds for the respondent nursing home comes from federal funding.

Federal funding is not state action. In Cannon v. University of Chicago, supra, the Seventh Circuit stated at p. 1071, fn. 8 that, "The fact

that there is federal support cannot be used to create sec. 1983 jurisdiction." The court cited Blackburn v. Fisk University, 443 F.2d 121, 123 (6th Cir. 1971), inter alia, in support of the statement. In Blackburn the court stated as follows at p. 123:

> "'Inasmuch as the Civil Rights Act of 1871, 42 U.S.C. sec. 1983, is concerned only with state action and does not concern itself with federal action we lay to one side as entirely irrelevant any evidence concerning the participation of the federal government in the affairs of the University.'"

See also the decision of the Seventh Circuit herein at 586 F.2d at pp. 61-62, fn. 4 and Molinar v. Western Electric Co., 525 F.2d 521, 532 (1st. Cir. 1975), cert. den. 424 U.S. 978 (1976).

References to federal funds (e.g., the Hill-Burton Act, 42 U.S.C. sec. 291) in some sec. 1983 cases as part of the courts' state action analyses relate to the fact that the relevant federal act



requires State administration and regulation as to such funds. See, e.g., Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963), cert. den. 376 U.S. 938.

The only place in the complaint herein where there is reference to State funding is in paragraph 9, where it is alleged that the State partially funds the WIN program. (42 U.S.C. sec. 630 et seq.). In his brief the petitioner points out that the State also partially funds the Medicaid program. (42 U.S.C. sec. 1396 et seq.). Since the Medicare program (42 U.S.C. sec. 1395 et seq.) is funded totally by the United States of America, the petitioner properly makes no reference to that program.

How can the petitioner argue that the respondent nursing home has a symbiotic relationship with the State of Wisconsin on the one hand and that it receives the majority of its funds from the federal government on the other hand?

PUBLIC FUNCTION

The Seventh Circuit recognized public function as a third theory of state action. The petitioner argues, although he did not plead it, that the respondent nursing home comes within this theory.

In Flagg Brothers, supra, this Court reemphasized the "carefully confined bounds" of the public function doctrine, just as it had in Hudgens v. NLRB, 424 U.S. 507 (1976).

In Flagg the petitioner argued that the resolution of private disputes was a "traditional function" of state government and that New York had delegated that function to the warehouseman by enacting a warehouseman's lien statute. (436 U.S. at p. 157) The Court rejected this argument, since it did not include the concept of exclusivity inherent in the public function doctrine. The Court stated, "While many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State'". (436 U.S. at p. 158)



This Court noted that its past decisions where public function were found fell into two categories--elections and company towns-- and that they had in common "the feature of exclusivity". (436 U.S. at p. 159)

This Court observed that, in Hudgens, supra, it had overruled its prior decision in Amalgamated Food Employees Union v. Logan Valley Plaza, Inc, 391 U.S. 308 (1968). In the latter case, this Court had expanded the company town category to cover a private shopping center. This Court noted in Flagg that the Hudgens overruling of Logan Valley was based on the interpretation of Justice Black as to the limited reach of the public function doctrine. This Court quoted Justice Black as follows:

> "'The question is, Under what circumstances can private property be treated as though it were public? The answer that Marsh gives is when that property has taken on all the attributes of a town, i.e., 'residential buildings, streets, a system of sewers, a sewage disposal plant

and a 'business block' on which business places are situated.' 326 U.S. at 502.' 391 U.S., at 332 (Black, J., dissenting)." (436 U.S. at p. 159)

In Flagg this Court also limited its prior decision in Evans v. Newton, 382 U.S. 296 (1966), involving a recreational park, as follows:

"We think Newton rests on a finding of ordinary state action under extraordinary circumstances. The Court's opinion emphasizes that the record showed 'no change in the municipal maintainence and concern over this facility,' id., at 301, after the transfer of title to private trustees. That transfer had not been shown to have eliminated the actual involvement of the city in the daily maintenance and care of the park." (436 U.S. at p. 159 fn. 8)

This Court concluded by referring to the "carefully confined bounds" of the "sovereign function" doctrine. (436 U.S. at p. 163)



As noted by the Seventh Circuit herein, care for the elderly is not and never has been a function traditionally and exclusively reserved to the State. The Seventh Circuit did not hold that the public function doctrine was static and inflexible and applicable only to traditions rooted in the past. Traditions can change; but, even today, care for the elderly is not an exclusive function of the State. As in Flagg Brothers there are "private arrangements" that are commonly made for caring for the elderly.

## CONCLUSION

The decision of the United States Court of Appeals for the Seventh Circuit herein is correct. Its affirmance of the dismissal of this action at the pleading stage need only be compared to this Court's affirmances of the dismissals at the pleading stage in Jackson and Flagg Brothers and in light of the paucity of the state action allegations in the complaint herein.

There are no special and important reasons for granting a writ of certiorari in this case. The

decision of the United States Court of Appeals for the Seventh Circuit herein does not conflict with any decision of this Court and does not conflict with any other decision of a court of appeals. The question of federal law herein has been settled by this Court in Flagg Brothers, Jackson and Moose Lodge.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

FOX, CARPENTER, O'NEILL & SHANNON, S.C.

BY: Bruce C. O'Neill
Bruce C. O'Neill